IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12995 of 2005
WITH
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WITH
SPECIAL CIVIL APPLICATION No. 13001 of 2005
WITH
SPECIAL CIVIL APPLICATION No. 13003 of 2005
WITH
SPECIAL CIVIL APPLICATION No. 13004 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MEHSANA NAGARIK SAHAKARI BANK LTD. - Petitioner(s)
Versus
HARILAL DEVRAMBHAI THAKKAR (HUF) THROUGH ITS KARTA & 3 - Respondent(s)

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Appearance :

MR PRAKASH K JANI for Petitioner(s) : 1,
MR AR GUPTA for Respondent(s) : 1,
MR MEHUL H RATHOD for Respondent(s) : 2,
RULE SERVED for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL
Date : 29/03/2006

ORAL JUDGMENT

1.In all the matters, as the issues involved are interconnected, they are being considered by this common judgment.

2.The short facts of the case are that the petitioner-bank had preferred the Lavad Suits against the Principal Debtor as well as the guarantors. In the said suits filed before the Registrars' Board of Nominee, the summons were served and the guarantors submitted the application for leave to defend in the concerned suit. The learned Nominee, after hearing both the sides, granted leave to defend on condition that the guarantors deposit the amount of Rs.50,000/- in F.D.Rs in each case. It appears that the guarantors carried the matter before the learned Tribunal against the aforesaid order of the learned Nominee below application for leave to defend and the said revisions were also dismissed. In the meantime,

the principal debtors who were also parties to the concerned suit, filed pursis for admitting the liability of the suit claim and the concerned officer of the bank made endorsement below the pursis and based on the pursis and also in view of the noncompliance of the condition of leave to defend by the guarantors, the awards came to be passed by the learned Nominee against the Principal Debtor concerned as well as the guarantors in all the concerned suits. No appeal is preferred by the Principal Debtor concerned against the award of the learned Nominee in the concerned suits, however, the guarantors preferred the appeal before the Gujarat State Co-operative Tribunal, so far as it related to passing the award against them. In the said appeal, the learned Tribunal after hearing both the sides, found that there was a case to be examined for defence of the guarantors namely that there was novatio of the original contract and as to

whether the surety can be said as discharged or not and, therefore, the learned Tribunal ultimately allowed the appeal partly by setting aside the award passed against the guarantors concerned in the concerned suit on condition that the concerned guarantors who were appellants in the appeal before the Tribunal deposit Rs.50,000/- by way of F.D.R. with the bank and after the amount is deposited, the learned Nominee is directed to consider the suit in view of the application of leave to defend and the learned Nominee is directed to decide the suit on merits within a period of three months and it is under these circumstances, the petitioner bank has approached to this Court by preferring the present petitions. As there were separate suits, separate appeals and though the judgment of the ld. Tribunal was common, separate petitions are being filed which are considered by this common judgment.

3.Heard Mr.Prakash K. Jani, learned counsel appearing for the petitioner, Mr.A.R. Gupta, learned counsel appearing for the Principal Debtor in all the matters, Mr. Rana with Mr.Mehul H. Rathod, learned counsel appearing for the guarantors concerned who were appellants before the learned Tribunal and the remaining respondents are served, but they have chosen not to appear.

4.Learned counsels appearing for both the sides submitted that the matter may be examined independently by this Court than the Prima facie, the observations were recorded by this Court (Coram: K.M. Mehta,J.) at the time when the order dated 04.07.2005 was passed which was in any case ex-parte since the matter is being heard finally today.

5.Mr. Jani, learned counsel appearing for the petitioner raised the first contention that the learned Tribunal ought not to have recorded the reasons for observing that there was novetio of

the contract in view of the endorsement of the officers of the bank below the pursis, submitted by the Principal Debtors and he further submitted that the said reasoning recorded is contrary to the terms and conditions of the deed of guarantee. He submitted that, therefore, the finding of the learned Tribunal recorded in the impugned judgment qua the aspects of novatio and discharged of the surety, is perverse to the record.

6. In my view, the finding recorded by the learned Tribunal in the impugned order on the aspects of novatio or finding substance in the contention of the guarantors for discharge, cannot be read as concluded finding neither to absolve the guarantors from the liability in the event the deed of guarantee is proved, nor it can be said that by such observations of the learned Tribunal, the learned Nominee who is to try the suit after remand is precluded from

taking an independent view of the matter on the basis of the evidence available before it and on the basis of the law prevailing at the relevant point of time. The document upon which, the reliance is being placed by Mr.Jani on behalf of the bank to contend that the finding is perverse to the record is yet to be proved after giving opportunity to the guarantors. Further, such observations of the learned Tribunal are to be considered only to the extent of concluding that there is a good defence to be examined by the learned Nominee at the trial and such cannot be read as a concluding observations on merits prior to the opportunity given to both the sides at the time of trial. Therefore, in my view, when the matter is remanded by the learned Tribunal, such observations would not prejudice the case of either side at the time of trial and, therefore, it would not be a case for interference in the order of the learned

Tribunal on the basis of the contention raised on behalf of the petitioner by Mr.Jani.

7.Mr.Jani, learned counsel appearing for the petitioner also contended that the learned Tribunal has committed ex-facie error in interfering with the award passed by the learned Nominee on the ground that it was on account of the pursis submitted by the Principal Borrower, the award was passed. He submitted that the learned Tribunal did not properly consider the reasoning recorded by the learned Nominee that there was noncompliance to the condition of leave to defend and, therefore, the learned Nominee was justified in passing the award, even against the guarantors.

8.The said contention of Mr.Jani would not detain further to this Court because it is not a matter where the learned Tribunal has not considered the said aspects at all that there was noncompliance to the condition of leave to defend but it appears that the learned Tribunal

has mainly considered the matter for remand in view of the peculiar circumstance that there is an arguable defence to be tried before the learned Nominee so far as it relates to the case of the guarantors-appellants before the learned Tribunal and, therefore, if after considering the said aspects, the discretion is exercised of remand, such exercise of discretion cannot be said to be so perverse which may call for interference by this Court in exercise of powers under Article 227 of the Constitution of India.

9. It was also contended on behalf of the petitioner that in any case, it was a money decree/award and the learned Tribunal ought not to have maintained the condition which was imposed for leave to defend by the learned Nominee which in any case, was not complied with and the award came to be passed. It was submitted on behalf of the petitioner by Mr.Jani that in case of money decree, normally,

there is no question of irreparable loss or injury and the principle is that the Court would direct the party facing money decree to deposit the amount subject to outcome of the proceedings. He, therefore, submitted that the learned Tribunal has exercised the discretion against well settled principles of law.

10.Mr.Rana appearing with Mr.Rathod, learned counsel appearing for the guarantors submitted that as such the award is not stayed or interfered against the Principal Debtor and the bank can recover the amount of the award from Principal Debtors concerned. He submitted that there are mortgaged properties and other properties of the Principal Debtors concerned and, therefore, it is not a case where there is absolute prohibition against the recovery of the amount. Mr.Gupta, learned counsel appearing for the Principal Debtors submitted that as such, the property of the principal debtors are there but in his submission, there are some

encroachments over the property and he submitted that in any event, the award is not stayed or interfered qua the Principal Debtors.

11.It is true that the appeal was at the instance of the guarantors and the learned Tribunal has set aside the award passed against the guarantors only and has remanded the matter qua the rights and contentions of the guarantors. So far as the award passed against the Principal Debtors is concerned, the same are final in the concerned suit and, therefore, the bank can recover the amount of the award from the person and the property of the Principal Debtor/borrower concerned but at the same time, it does appear that the condition imposed for granting leave to defend was not complied with by the guarantors and consequently, it has led the learned Nominee to pass the award against the guarantors also in addition to the Principal Debtor on the basis of the pursis submitted by the Principal Debtor. If the mater

is examined strictly on exercise of the discretion by the learned Nominee in a case, where there is noncompliance of condition for leave to defend, it cannot be said that the learned Nominee committed any error in proceedings to pass the award against the party who did not comply with the condition of leave to defend and the reason obvious is that in absence of any defence, the learned Nominee could not proceed further for adjudication of the suit or on the basis of the evidence available for passing the award. However, in the present case, the additional circumstance which prima facie, observed by the learned Tribunal is that there is an arguable defence to be tried before the learned Nominee. As such on account of the said arguable defence for trial, the condition was imposed by the learned Nominee which was admittedly not complied with by the guarantors. Therefore, while exercising the appellate power, it was required for the

learned Tribunal to also take into consideration the equitable aspects namely that if a party has not complied with the condition of leave to defend and has allowed the matter to proceed further and as a consequence thereof, the award is passed, but while considering the matter for remand may be on the same defence, which was raised before the learned Nominee, the discretion deserves to be exercised in a manner which may result into not encouraging the litigant to stall the execution of the decree in absolute by contending that there was an arguable defence to be tried. If a defaulting party comes forward by raising grievance against the award based on the noncompliance of the condition of leave to defend, the judicial discretion requires that the additional condition ought to have been imposed by the learned Tribunal than the condition imposed by the learned Nominee while granting leave to defend, more particularly, in

view of the circumstance that the proceedings before the learned Nominee are concluded and defaulting party is facing the award which is like a money decree. It is true that such money decree/award came to be passed without their being trial and, therefore, in a matter where the suit or the proceeding is proceeded ex-parte on account of the circumstances beyond the control of the party facing the award, the Court would impose a condition of normally depositing 25% of the awarded amount and also reasonable cost for compensating the default with a view to see that such practice on the part of the defaulting party is not encouraged and defaulting party may not be in a position to earn premium on account of its own default. The reference may be made to the decision of this Court in the cases of Jai Ambe Ice Factory, Veraval & others V/s. Recovery Officer, Veraval Peoples' Co-operative Bank Ltd., reported in AIR 2004 Gujarat 99 and

Moaiyedbhai Mulla Abbashbhai Karkhanawala and Ors. V/s. Kankaria Maninagar Nagrik Sahakari Bank Ltd., & Ors. Reported in 2003(1) GCD 482(Guj). It is an admitted position that there was a default for compliance of the conditions of leave to defend but the only additional circumstance in the present case is that the award against the Principal Debtor/Borrower is not stayed and the bank has an option of recovering the amount as per the award from the Principal Debtor/Borrower.

12.Therefore, taking into consideration the aforesaid aspects, I find that the exercise of of discretion by the learned Tribunal if allowed to continue, may result into encouraging the litigant to apply dilatory tactics and, thereafter to complain by preferring appeal before the higher forum. Therefore, taking into consideration the aforesaid, I find that the discretion could not have been exercised by the learned Tribunal

without imposing of the condition of depositing 15% of the awarded amount with the petitioner-bank subject to the outcome of the trial by the learned Nominee after remand and, therefore, to that extent it can be said that ex-facie error is committed by the Tribunal while not imposing the appropriate condition for remand and for trial upon the defence of the guarantors before the learned Nominee; So will be the case for compensating the default of the guarantors for noncompliance of the condition of leave to defend. In any case, on account of the noncompliance of the condition of leave to defend, if the learned Nominee has proceeded further for passing the award against the guarantors, it can not be said that the bank is at fault or that under such circumstances, the bank can be saddled with the cost of litigation of appeal. Therefore, the Tribunal ought to have considered the matter for imposition of condition to pay a reasonable amount as cost

for compensating the default made on behalf of the guarantors qua not complying with the conditions of leave to defend. Considering the facts and circumstances, it appears that the amount of Rs.5000/- per matter is a reasonable amount for compensating the default by the guarantors in not complying with the conditions of leave to defend.

13.In view of the aforesaid observations and discussions, the judgment and order of the learned Tribunal of setting aside the award passed against the guarantors in the concerned suit and on remanding the matter to the learned Nominee are not interfered with, but there shall be an additional condition of depositing 15% of the awarded amount including the deposit of Rs.50,000/- as ordered by the learned Tribunal and the condition of paying Rs.5,000/- per suit/award as compensation for the default to the petitioner bank. After the aforesaid amounts are deposited and the cost is paid,

either side may move the learned Nominee for trial of the suit and the suits may be disposed of as early as possible, preferably within a period of three months as observed by the learned Tribunal in the impugned judgment. It is made clear that the amount which may be deposited by the guarantors with the bank, shall be kept in the separate account and the credit thereafter if any shall be subject to final out come in the proceedings of the concerned suit by the learned Nominee after remand. In the event, the amount is not deposited within a period of two months, the bank shall be at the liberty to proceed with execution of the award in accordance with law.

14.Petitions are partly allowed to the aforesaid extent. Rule partly made absolute accordingly.

(JAYANT PATEL,J.)

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